LONPAC INSURANCE BHD v. LUCKY FROZEN SDN BHD & ORS

HIGH COURT MALAYA, KUALA LUMPUR
WONG CHEE LIN JC
[ORIGINATING SUMMONS NO: WA-24NCC-521-12-2016]
30 APRIL 2018

CIVIL PROCEDURE: *Judgments and orders – Declaratory order and notice – Insurer sought declaratory order on issue of liability – Whether order and notice properly served – Application to set aside order – Whether should be allowed*

ROAD TRAFFIC: *Insurance – Motor insurance – Liability – Victim of accident injured due to lorry driver's negligence – Whether lorry driver an authorised driver – Whether insurers' policy term covered negligence of authorised driver – Whether insurers liable for negligent act of authorised lorry driver – Road Transport Act 1987, s. 96(3)*

INSURANCE: *Motor insurance – Liability – Victim of accident injured due to lorry driver's negligence – Whether lorry driver an authorised driver – Whether insurers' policy term covered negligence of authorised driver – Whether insurers liable for negligent act of authorised lorry driver – Road Transport Act 1987, s. 96(3)*

The plaintiff issued an insurance policy in respect of a motor lorry registered in the name of the third defendant agreeing, *inter alia,* to indemnify the first defendant and its authorised drivers. The plaintiff received a notification of an accident between a lorry and the first defendant's lorry which was at the material time driven by the second defendant. The second defendant was an authorised driver pursuant to the policy issued by the plaintiff. The third defendant was the lorry attendant who sat beside the driver and he sustained injuries as a result of the accident. The third defendant commenced legal proceedings against the first and second defendants in the Temerloh High Court in respect of the injuries sustained by him. Meanwhile, the plaintiff filed an originating summons ('OS') in the present court pursuant to s. 96(1) and (3) of the Road Transport Act 1987 for a declaration that the policy issued by the plaintiff was unenforceable and that the plaintiff was not liable under any order or judgment that may be obtained by the third defendant in the proceedings filed in relation to the said accident. In the absence of the third defendant, the plaintiff obtained order in terms of its OS ('order'). The reason the plaintiff sought the declaration was because pursuant to the policy, it was expressly stated that the plaintiff would not pay for death or bodily injury to any person where such death or injury arose out of and in the course of employment. By a notice of application, the third defendant applied to set aside the order pursuant to O. 28 r. 4(1) of the Rules of Court 2012 ('ROC') on the grounds, *inter alia*, that the cause papers in the OS were not served

on him. In support of its stand that the cause papers had been served on the third defendant, the plaintiff had produced an AR Registered Card but without any acknowledgement.

Held (dismissing OS with costs):

(1) On the third defendant's allegation that he did not receive the order, there was no doubt that the address of the third defendant was correctly stated in the covering letter of the order. There was no reason why the third defendant would not have received the cause papers which were posted to his correct address. (para 18)

(2) On the allegation that the third defendant had not been served with the notice pursuant to s. 96(3) of the Road Transport Act, the plaintiff had shown that they had sent the notice addressed to the third defendant's address and the AR Registered Card was returned and acknowledged by one P Parvathy. Although the third defendant did not acknowledge the AR Registered Card, he also did not say that P Parvathy was not known to him. In the circumstances, the plaintiff had discharged the burden of showing that the notice pursuant to s. 96(3) of the Road Transport Act had been served on the third defendant by sending the notice through registered post. (paras 20 & 23)

(3) The third defendant was not an employee of the authorised driver but was the employee of the insured, therefore, the addition of the words 'Or your authorised driver' in the exception clause should not make any difference to the liability of the insurer to indemnify the authorised driver if he was found to have been negligent in causing the injuries to the third defendant (*Tirumeniyar Singara Veloo v. Malaysia Motor Insurance Pool*). (para 45)

Case(s) referred to:

Ali Jeman v. Indranika Jaya Sdn Bhd & Ors [2016] 1 LNS 1795 HC ***(refd)***
Amanah Merchant Bank Bhd v. Lim Tow Seng & Ors [1993] 2 CLJ 635 HC ***(refd)***
Mary Colete John v. South East Asia Insurance Bhd [2010] 8 CLJ 129 FC ***(dist)***
Maxland Sdn Bhd v. Timatch Sdn Bhd [2014] 7 CLJ 149 FC ***(refd)***
McSteen v. McCarthy [1952] NI 33 ***(refd)***
Pacific & Orient Insurance Co Bhd v. Rasip Hamsudi & Ors [2017] 4 CLJ 572 CA ***(refd)***
Sivamurthy Muniandy & Ors v. Lembaga Kumpulan Wang Simpanan Pekerja [2012] 9 CLJ 598 CA ***(refd)***
Tan Keng Hong & Anor v. New India Assurance Co Ltd [1977] 1 LNS 130 PC ***(dist)***
Tirumeniyar Singara Veloo v. Malaysian Motor Insurance Pool [2017] 8 CLJ 682 CA ***(foll)***
United Oriental Assurance Sdn Bhd v. Lim Eng Yew [1991] 3 CLJ 2418; [1991] 1 CLJ (Rep) 484 SC ***(refd)***
Yap Ke Huat & Ors v. Pembangunan Warisan Murni Sejahtera Sdn Bhd & Anor [2008] 4 CLJ 175 CA ***(refd)***

Legislation referred to:
Interpretation Acts 1948 and 1967, s. 12
Road Transport Act 1987, ss. 91(1)(b)(bb), 96(1), (3), 118(1)
Rules of Court 2012, O. 10 rr. 1(1), 5, O. 28 r. 4(1)

For the plaintiff - Najibah Saari; M/s VP Nathan & Partners
For the 3rd defendant - M Ramachelvam & Nurul Syuhada Abdullah; M/s Rama-Rozi & Assocs

Reported by Sandra Gabriel

JUDGMENT

Wong Chee Lin JC:

[1] This is an application by the third defendant to *inter alia* set aside the default order obtained by the plaintiff dated 22 February 2017. I have allowed the application. These are the full reasons for my decision.

Salient Background Facts

[2] The plaintiff had issued an insurance policy in respect of motor-lorry No WMU 9935 registered in the name of the first defendant for the period from 9 April 2013 to 8 April 2014 agreeing *inter alia* to indemnify the first defendant and its authorised drivers for the amount which the first defendant or its authorised drivers are legally liable to pay for accident caused by or arising out of the use of the vehicle for death or bodily injury to any person save exempted in the policy.

[3] The plaintiff received notification of an accident which occurred on 15 March 2014 between a lorry No. BHK 9596 and the first defendant's lorry which was at the material time driven by the second defendant. The second defendant is an authorised driver pursuant to the policy issued by the plaintiff.

[4] The third defendant was the lorry attendant who sat beside the driver and he sustained injuries as a result of the accident.

[5] The third defendant commenced legal proceedings against the first and second defendants in the Temerloh High Court in respect of the injuries sustained by him.

[6] Meanwhile, the plaintiff filed an originating summons in this court pursuant to s. 96(1) and (3) of the Road Transport Act 1987 for a declaration that the policy issued by the plaintiff is unenforceable and that the plaintiff is not liable under any order or judgment that may be obtained by the third defendant in proceedings filed in relation to the said accident.

[7] In the absence of the third defendant, the plaintiff obtained an order in terms of its originating summons on 22 February 2017. The said order provided that the insurance policy issued by the plaintiff is unenforceable in respect of the said accident and that the plaintiff is not liable for any order or judgment pursuant to s. 96 of the Road Transport Act 1987 which might be obtained by the third defendant in relation to the said accident.

[8] By a notice of application filed on 8 March 2018, the third defendant applied to set aside the order dated 22 February 2017.

[9] This application is made pursuant to O. 28 r. 4(1) of the Rules of Court 2012 ("ROC").

The Law

[10] Order 28 r. 4(1) of the ROC provides as follows:

> **Order 28. Originating summons procedure**
>
> **Directions by Court (O. 28, r. 4)**
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> 4(1) The Court hearing an originating summons may, if the liability of the defendant to the plaintiff in respect of any claim made by the plaintiff is established, make such order in favour of the plaintiff as the nature of the case may require, but where the Court makes an order under this paragraph against a defendant who does not appear at the hearing, the Court, if satisfied that it is just do so, may rehear the originating summons.

Findings Of The Court

[11] The third defendant alleged that the cause papers in the originating summons were not served on him. In support of its stand that the cause papers had been served on the third defendant, the plaintiff had produced an AR registered card but without any acknowledgement. The address of the third defendant is the correct address. However, the third defendant maintained that he did not have knowledge of the originating summons and was not served with the cause papers.

[12] The third defendant relied on the case of *Ali Jeman v. Indranika Jaya Sdn Bhd & Ors* [2016] 1 LNS 1795; [2016] MLJU 1485 where the High Court had referred to the decision in *Amanah Merchant Bank Bhd v. Lim Tow Seng & Ors* [1993] 2 CLJ 635; [1993] 2 MLJ 241 and held as follows:

> [15] It is noted that the Plaintiff's counsel conceded that the AR card was not returned to him in order to prove that the Writ of Summons and the Statement of Claim was delivered and received by the 2nd Defendant. This Court finds that the fact that the said AR card was not returned most probably showed that the Writ of Summons and the Statement of Claim was not delivered. In any event the Plaintiff bears the burden to prove service and in this case, this Court finds that the Plaintiff is unable to conclusively prove it.

[16] Since the Writ of Summons and the Statement of Claim are not served, the Judgment in Default of Appearance is irregular and the Judgment in Default of Appearance must be set aside *ex debito justitiae*.

[17] In *Amanah Merchant Bank Bhd v. Lim Tow Choon* [1993] 2 MLJ 241, the court held *inter alia* that:

> It is only upon the return of the AR Card with the acknowledgement of receipt that it can truly be said that the letter of demand has been effectively served on the guarantor. Anything short of that can never amount to the letter if demand having been served on the guarantor where posting is done through AR registered post.
>
> Perhaps the only case which falls on all fours within the instant case is that decided by me in *Public Bank Bhd v. Rasatulin Holdings Sdn Bhd & Ors*, where I held that to constitute a proper demand, the burden is on the plaintiff to prove that the AR card is returned duly acknowledged.

[13] On the other hand, the plaintiff relied on s. 12 of the Interpretation Acts 1948 and 1967 which states that:

> Where a written law authorises or requires a document to be served by post, then, until the contrary is proved, service:
>
> (a) shall be presumed to be effected by properly addressing, prepaying and posting by registered post a letter containing the document; and
>
> (b) shall be presumed to have been effected at the time when the letter would have been delivered in the ordinary course of the post.

[14] The Rules of Court 2012 do authorise the service of an originating summons by sending to the defendant by prepaid AR registered post addressed to his last known address pursuant to O. 10 r. 1(1) read together with O. 10 r. 5.

[15] The plaintiff also relied on the Federal Court case of *Maxland Sdn Bhd v. Timatch Sdn Bhd* [2014] 7 CLJ 149; [2014] 6 MLJ 1 wherein the court said: "Once the writ was posted to the defendant's registered address, it became *prima facie* evidence that the documents were duly served."

[16] In *Yap Ke Huat & Ors v. Pembangunan Warisan Murni Sejahtera Sdn Bhd & Anor* [2008] 4 CLJ 175; [2008] 5 MLJ 112, the Court of Appeal held as follows:

> Whereas, the fact that the prepaid AR registered post acknowledgement card of the sixth defendant was not returned did not mean that the service of the writ and statement of claim were defective. Order 10 r. 1 of the RHC required that the writ be sent by prepaid AR registered post to the defendant's last known address. Once there was sufficient evidence of posting, then it was deemed to be served on the defendant. There was no necessity to prove that the acknowledgement of the AR registered posting had been returned.

[17] In *Sivamurthy Muniandy & Ors v. Lembaga Kumpulan Wang Simpanan Pekerja* [2012] 9 CLJ 598; [2012] MLJU 1691, the Court of Appeal held "there is no necessity for the respondent to prove receipt of the writ by the person named in the AR registered post."

[18] In this case, there is no doubt that the address of the third defendant was correctly stated in the covering letter. The third defendant has received the s. 96(3) notice and the order dated 22 February 2017 (to which I will refer later). There is no reason why he would not have received the cause papers which were posted to his address.

[19] I find on balance that the cause papers had been duly served on the third defendant. The third defendant has not rebutted the presumption of due service of the cause papers on him.

[20] The third defendant also alleged that he had not been served with the notice pursuant to s. 96(3) of the Road Transport Act.

[21] The relevant parts of s. 96 provide as follows:

> **96. Duty of insurers to satisfy judgments against person insured in respect of third party risks.**
>
> (1) If, after a certificate of insurance has been delivered under subsection 91(4) to the person by whom a policy has been effected, judgment in respect of any such liability as is required to be covered by a policy under paragraph 91(1)(b) (being a liability covered by the terms of the policy) is given against any person insured by the policy, then notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled the policy, the insurer shall, subject to this section, pay to the persons entitled to the benefit of the judgment any sum payable thereunder in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any written law relating to interest on judgments.
>
> (2) No sum shall be payable by an insurer under subsection (1):
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> ...
>
> (3) No sum shall be payable by an insurer under subsection (1) if before the date the liability was incurred, the insurer had obtained a declaration from a court that the insurance was void or unenforceable:
>
> Provided that an insurer who has obtained such a declaration as aforesaid in an action shall not thereby become entitled to the benefit of this subsection as respects any judgment obtained in proceedings commenced before the commencement of that action unless, before or within seven days after the commencement of that action, he has given notice thereof to the person who is the plaintiff in the said proceedings specifying the grounds on which he proposes to rely, and any person to whom notice of such an action is so given shall be entitled if he thinks fit to be made a party thereto.
>
> ...

[22] Section 118(1) of the Road Transport Act on service of notice provides that:

> Section 118. Service of notices.
>
> (1) Any notice required to be given or served under this Act, may, unless some other form of service is prescribed, be served on the person affected thereby as follows:
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> (a) by giving the original copy of the notice personally to such person;
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> (b) by affixing a copy of the notice on any conspicuous part of the house or any other place such person usually resides;
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> (c) by affixing a copy of the notice on any conspicuous part of such person's motor vehicle; or
>
> (d) by sending the notice through registered post.

[23] In this case, the plaintiff has shown that they had sent the notice addressed to the third defendant's address and the AR registered card was returned and acknowledged by one P Parvathy. Although the third defendant did not acknowledge the AR registered card, he also did not say that P Parvathy is not known to him. Since the address of the third defendant was correctly stated in the letter, and since the third defendant had impliedly admitted that he had received the said notice when he said in his affidavit: "Saya selanjutnya menegaskan bahawa saya adalah orang awam dan saya tidak memahami kandungan notis tersebut dan tidak mempunyai pengetahuan berhubung kesan dan akibat notis tersebut," I find that the plaintiff has discharged the burden of showing that the notice pursuant to s. 96(3) of the Road Transport Act has been served on the third defendant by sending the notice through registered post.

[24] The plaintiff has raised the issue of delay on the part of the third defendant in filing the application herein. The third defendant admits that there was a delay on his part but explained that it was not intentional. He said that he only came to know of the order dated 22 February 2017 towards the end of April 2017 and he had referred the matter to his solicitors on 16 May 2017.

[25] His solicitors had filed on his behalf an originating summons in the Temerloh High Court to set aside the order dated 22 February 2017, instead of filing an application in this court to set aside the said order.

[26] On 25 October 2017, the High Court of Temerloh transferred the matter to the Kuala Lumpur High Court to be heard together with these proceedings and the plaintiff raised a preliminary objection which was allowed by the court which held that the third defendant should file an application to set aside the order in this originating summons which was what the third defendant had subsequently done.

[27] The third defendant submitted that he filed the originating summons in Temerloh High Court based on the decision in *Pacific & Orient Insurance Co Bhd v. Rasip Hamsudi & Ors* [2017] 4 CLJ 572.

[28] In that case, the victim of an accident wished to set aside a default order obtained by the insurers pursuant to s. 96(3) of the Road Transport Act 1987 and he did so by way of filing an originating summons. The Court of Appeal in that case found in favour of the victim and did not say that he should not have filed an originating summons.

[29] I find that the third defendant's explanation for his delay in filing the application herein is acceptable and his application for extension of time should be granted. However, as the order dated 22 February 2017 was regularly obtained, the third defendant has the burden of showing a defence on the merits.

[30] The reason the plaintiff sought a declaration that it is not liable under the insurance policy issued to the first defendant is because the third defendant is an employee of the first defendant insured. Pursuant to the policy, it is expressly stated that the plaintiff will not pay for death or bodily injury to any person where such death or injury arises out of and in the course of the employment of such person by you (the first defendant) or your authorised driver (the second defendant).

[31] It is not in dispute that the third defendant is employed by the first defendant.

[32] In answer to the plaintiff's contention, the third defendant relies on the case of *Tirumeniyar Singara Veloo v. Malaysian Motor Insurance Pool* [2017] 8 CLJ 682; [2017] MLJU 414 where the facts are similar to those in the present case. In that case, the plaintiff is the insurer of the motor-lorry owned by the second defendant who is the purchaser of the insurance policy. The first defendant is the driver of the motor-lorry who in an accident caused injury to the third defendant. The third defendant was a lorry attendant in the said lorry and was an employee of the insured, the second defendant. The policy issued to the insured contained a clause excluding liability in respect of death or injury to any person in the employment of the insured arising out of and in the course of such employment. The High Court had granted a declaration that the policy issued to the insured was cancelled and unenforceable as the third defendant was the employee of the insured. On appeal, the decision was overturned and the Court of Appeal held as follows:

> [16] What is important to note in this case is that the purported tortfeasor is the 1st defendant who is the authorised driver of the 2nd defendant. Under the general law of negligence, the 1st defendant will be liable to the 3rd defendant if he is found liable. The policy terms specifically state that it will indemnify the authorised driver. That is to say, not only the

policy covers the relationship between the 2nd defendant and the insurer but over and above it extends the coverage also to an authorised driver. However, RTA by itself does not prohibit the 3rd defendant suing the 1st and 2nd defendants under the common law. What RTA does is that it restricts the scope of insurer's liability in respect of the mandatory policy. However, if the insurer wants to give extended cover such as to cover the negligence of the 1st defendant, there is no prohibition under the RTA. This distinction must be kept in mind. Support for the proposition is found in books and case laws. To name a few are as follows:

(i) Learned author S. Santhana Dass in his book *'The Law of Motor Insurance'* (2010) Marsden Law Book, Kuala Lumpur, at page 107, observes:

> If a person is travelling in a motor vehicle driven by the insured, arising out of and in the course of his employment with the insured, the policy does not cover him if he is so injured or in case of his death.
>
> However, if the motor vehicle was at all material times driven by the authorised driver and not the insured and the authorised driver is a party to the suit, then the insurer, by virtue of the authorised driver's clause in the policy will be liable as they have agreed under the policy to indemnify the authorised driver as though he was the insured and was separately covered under the terms of the policy. As the passenger is not an employee of the authorised driver, the above 'employee' exception will not apply.

(ii) In *Halsbury's Laws of England* 3rd edn. Vol. 22, pg 361, observes:

> Even if a policy has an exclusion of liability for injuries sustained in the course of his employment by an employee of the assured, this exclusion is, so far as a permitted driver is concerned quite ineffective; if a driver and his passenger are fellow employees of the assured, the passenger is not the employee of the driver. The passenger can, therefore, obtain compensation from the insurance company if he is injured by the driver's negligence, notwithstanding the exclusion of injuries sustained by the employee of the assured, if there is a permitted driver clause and he sues the driver rather than his employer.

[17] It is now well established that the terms of the insurance policy under consideration has at least two contract of insurance as explained in books and case laws. To put it in simple terms, one contract is to cover the mandatory coverage requirement under the RTA and the other contract to cover the common law liability to some extent. To name a few are as follows:

A (a) In the case of *Manap bin Mat v. General Accident Fire & Life Assurance Corpn Ltd* [1971] 1 MLJ 134 it is stated as follows: "In the insurance policy under consideration there was not one contract of insurance only as there was one contract with the policy holder and another with such person driving on the policyholder's order or with his permission."

B (b) In *Lim Eng Yew v. United Oriental Assurance Sdn Bhd* [1989] 2 CLJ (Rep) 65, at page 67, it was stated:

> It will be seen from the above provisions in the Policy that under para 2 of Section II – Liability to Third Party – an authorised driver would be indemnified by the insurers as though he was
C the insured. This means that Lim Swee Keong the authorised driver in this case was separately covered under the terms of the policy – and the plaintiff was certainly not a person in the employment of Lim Swee Keong as envisaged under exception (ii) in the exceptions to s. II.

D (c) *S. Santhana Dass* at page 109 says:

> It is clear therefore that when a passenger is injured or dies as a result of an accident involving the motor vehicle, whilst he was travelling in the course of his employment with the insured, the insurer will still be liable under the policy if the motor
E vehicle was driven by the authorised driver and the plaintiff or his dependants had brought in the driver as a party to the proceedings. This is because the Courts have held that there is a separate cover under the policy in respect of the authorised driver, the exception relating to employees of the insured will not apply under the separate cover.

F [18] It must also be noted that RTA to some extent is a social legislation attempting to provide some statutory protection to road victims. It does not prohibit greater coverage for road victims under the insurance policy terms. The learned trial judge in our view fell into grave error of law when she construed section 91(1)(aa) in a manner to favour the plaintiff when
G the plaintiff's policy term covers negligence of the 1st defendant which has nothing to do with the statutory mandatory coverage.

[33] That case is authority for the proposition that where the victim of the accident is an employee of the insured, if he is injured in the course of being driven in the vehicle by the authorised driver, he will be covered by the
H policy which covers the authorised driver since he is not an employee of the authorised driver. This is notwithstanding the existence of an exception clause in the policy which excludes liability for injuries suffered by an employee of the insured. In this case, it is not in dispute that the third defendant is the employee of the first defendant and not the employee of the
I authorised driver who is the second defendant and the third defendant has also sued the second defendant in the proceedings in the Temerloh High Court.

[34] The plaintiff submits that the *Tirumeniyar* case should not be followed as it implies that the exception in the policy will only apply in a situation where a passenger is injured in the course of his employment and the vehicle is driven by the insured who is the employer of the injured passenger. Since the insured in this case is a limited company, it obviously cannot drive the vehicle so the exception can never apply which does not make sense.

[35] However, the *Tirumeniyar* case is exactly on point on the facts and it is a Court of Appeal decision by which I am bound.

[36] The plaintiff referred to the Privy Council case of *Tan Keng Hong & Anor v. New India Assurance Co Ltd* [1977] 1 LNS 130; [1978] 1 MLJ 97 where the Privy Council referred to the case of *McSteen v. McCarthy* [1952] N.I. 33 which said:

> The reason why an employer is rarely able to claim under his policy of insurance in respect of injury sustained by anyone in his employ whilst being carried on one of his vehicles, is because the accident causing such an injury would usually arise out of and in the course of the passenger's employment; and the insurers would accordingly be protected by Exception (II).

[37] The facts in *Tan Keng Hong* are not similar to the facts of the present case and what was cited above was not the *ratio decidendi* of the decision.

[38] The plaintiff also referred to the Federal Court case of *Mary Colete John v. South East Asia Insurance Bhd* [2010] 8 CLJ 129; [2010] 6 MLJ 733 wherein the court said *inter alia*: "The respondent company is liable to pay in respect of (i) death or bodily injury to any person except (ii) where such death or injury arises out of the employment of such person by the insured."

[39] However, the issues in *Mary Colete* were not the same or similar to the issue in the present case. In that case, two questions were framed for the Federal Court's determination. First, whether the words "contract of employment" in s. 75(1)(b)(ii) of the Road Traffic Ordinance 1987 (RTO) (superseded by s. 91(1)(b)(bb) of the Road Transport Act 1987 ("RTA") had been enacted by Parliament to cover only passengers who were being carried pursuant to a contract of service, or whether the words covered passengers who were carried pursuant to a variety of employment and business reasons, such as in the case of the appellant in the employment and business reasons, such as in the case of the appellant in the instant appeal. Second, whether it was necessary to read into s. 91(1)(b)(bb) of the RTA, s. 75(1)(b)(ii) of the RTO and the insurance policy after the words "contract of employment" the words "'under a contract of service' and thereby restrict the meaning of the words 'contract of employment'."

[40] Again, it can be seen that the *Mary Colete*'s case is clearly distinguishable.

[41] However, the plaintiff is also relying on a High Court decision in *Lonpac Insurance Bhd v. Ridzuan Bin Rahim & Ors* (unreported) which was affirmed by the Court of Appeal. In that case, on facts which are similar to those in the present case, the High Court held that the insurers are entitled to repudiate liability in respect of the accident. In that case, the deceased was the co-driver/substituted driver sitting in the lorry driven by the authorised driver of the insured. Both the deceased and the lorry driver were employees of the insured as in the present case and the policy contained a similar exception to the effect that the insurer will not pay for death or bodily injury to any person where such death or injury arises out of and in the course of the employment of such person by you or by your authorised driver. The present policy has the same exception clause.

[42] In the *Lonpac* case, the dependents of the deceased relied on the case of *United Oriental Assurance Sdn Bhd v. Lim Eng Yew* [1991] 3 CLJ 2418; [1991] 1 CLJ (Rep) 484 where the Supreme Court then applied and accepted the principles of law in the case of *Richard v. Cox* and it was stated as follows:

> In *Richard v. Cox* [1942] 2 All ER 624 the same state of affairs arose as is present here, the person injured and the driver of the car being both in the employ of the owner of the car. The driver was negligent, and the plaintiff recovered damages in action against him. The question that arose whether the policy obliged the underwriters to indemnify the driver, and it was held that it did by reason of its terms which provided:
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> > In terms of and subject to the limitations of and for the purposes of this section the company will treat as though he were the insured person any person who is driving such vehicle on the insured's order or with his permission provided (a) that such person is not entitled to indemnify under any other policy
>
> It was held that there were in effect two policies in one document, a policy insuring the owner of the vehicle and a policy insuring the driver. The owner of the vehicle would not have been able to recover against the underwriters because the policy did not cover his liability to his own servant, but as the terms of the policy insured the driver himself, nevertheless the driver was covered by the policy and was entitled to an indemnity by the insurance company against the damages which he had to pay.

[43] The High Court in *Lonpac* held that the deceased was in the lorry at all material times as co-driver, it is therefore apparent that the death of the deceased falls within the scope of cl. (b) exception to Section B which prescribed that the insurer will not pay for the death or bodily injury to any person where such death or injury arises out of and in the course of the employment of such person by the insured OR his/her authorised driver.

[44] The High Court said that *Richards v. Cox and Lim Eng Yew v. United Oriental Assurance Sdn Bhd* were not applicable as the wordings used in the insurance policy in those cases were: "Provided always that the company shall not be liable in respect of (b) death or bodily injury to any person in the employment of the insured arising out of and in the course of employment" whereas in the *Lonpac*'s case the wordings stated:

> We will NOT pay for (b) death or bodily injury to any person where such death or injury arises out of and in the course of the employment of such person by You or your authorised driver.

[45] So here we have two different Court of Appeal decisions deciding differently on the same facts. Which should I follow? I decide to follow the *Tirumeniyar*'s case because I find that the difference in the wording of the policies in *Richards v. Cox* and the *United Oriental Assurance* case is not material. The fact is that the third defendant is not an employee of the authorised driver but is the employee of the insured so the addition of the words "Or your authorised driver" in the exception clause should not make any difference to the liability of the insurer to indemnify the authorised driver if he was found to have been negligent in causing the injuries to the third defendant.

[46] As for the finding of the learned judge in the *Lonpac*'s case that to apply the doctrine of "two policies in one document" would render the exception clause meaningless and redundant in all circumstances, that is not necessarily true. If the insured is an individual and the driver, and the victim of the accident was the employee of the insured, then the insurer will not be liable to indemnify the insured pursuant to the exception clause.

[47] Although the third defendant in his application has asked for the default order dated 22 February 2017 to be set aside and the originating summons be fixed for hearing *inter partes*, I am empowered pursuant to O. 28 r. 4 of the Rules of Court 2012 to re-hear the originating summons and treat this application as one for the re-hearing of the originating summons. Since the parties have submitted extensively on the only issue in relation to the originating summons, which is whether the plaintiff is liable to indemnify the authorised driver since the injured third defendant was the employee of the insured in the light of the exception clause and since I have decided to follow the *Tirumeniyar*'s case, I proceed to dismiss the originating summons with costs of RM5,000 subject to allocator, payable by the plaintiff to the third defendant. Prayers 1 and 2 of the notice of application are also allowed.